IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-4170, 01-4241

UNITED STATES OF AMERICA,
Appellant,

v.

THOMAS K. WELCH &
DAVID R. JOHNSON
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

STATEMENT OF THE ISSUES

1. Whether the district court erred by dismissing the Travel Act counts of the indictment.

2. Whether, after the Travel Act counts were dismissed, the district court erred by dismissing the remaining conspiracy and mail/wire fraud counts.

JURISDICTION

These are consolidated government appeals from the dismissal of the indictment in a criminal case. The notices of appeal were timely filed on August

13 and November 20, 2001, following entry of the district court's order dismissing some counts of the indictment on July 16, 2001, and its order dismissing the remaining counts of the indictment on November 15, 2001. Doc. No. 137-3 (7/16/01 partial dismissal order), App. 316-318; Doc. No. 153-1, App. 348-349 (8/13/01 notice of appeal); Doc. No. 170, App. 374 (11/15/01 final dismissal order); Doc. No. 171, App. 375-376 (11/20/01 notice of appeal). The district court's jurisdiction was based on 18 U.S.C. 3231. This Court's jurisdiction is based on 18 U.S.C. 3731.

STATEMENT OF THE CASE

An indictment filed on July 20, 2000, in the United States District Court for the District of Utah charged Thomas K. Welch and David R. Johnson with conspiracy (18 U.S.C. 371) (Count 1), use of communications in interstate and foreign commerce to facilitate unlawful activity (18 U.S.C. 1952(a)(3) (Travel Act)) (Counts 2-5), mail fraud (18 U.S.C. 1341, 1346) (Counts 6-10), and wire fraud (18 U.S.C. 1343, 1346) (Counts 11-15). App. 25-59. The district court (Hon. David Sam) dismissed the Travel Act counts on July 16, 2001, and filed a memorandum opinion explaining that dismissal on August 9, 2001. Doc. No. 137-1 (order), App. 316-318; Doc. No. 152-2 (memorandum), App. 319-347. The district court dismissed the remaining counts of the indictment in a memorandum

and order filed on November 15, 2001. Doc. No. 171, App. 350-374. These government appeals timely followed each dismissal order, and the appeals have been consolidated by order of this Court. App. 377-378 (consolidation order).

STATEMENT OF FACTS

1. The relevant facts are alleged in the indictment (App. 25-59): The Salt Lake Bid Committee for the Olympic Winter Games (SLBC) was formed to seek the right to host the Olympic Winter Games. Ct. 1, ¶ 1. After the 2002 Games were awarded to Salt Lake City, the SLBC was renamed the Salt Lake Organizing Committee for the 2002 Olympic Winter Games. Ibid. This brief will use the acronym "SLBC" to refer to both organizations. During the relevant period, defendant Thomas K. Welch was the President of the SLBC, and defendant David R. Johnson was the Senior Vice President, and in those capacities defendants "planned, organized, directed, managed, and coordinated the activities of the SLBC[]." Ct. 1, ¶¶ 5, 6.

The site of an Olympic Games is selected by members of the International Olympic Committee (IOC). Ct. 1, ¶ 11. IOC members take an oath to respect the provisions of the Olympic Charter and to keep themselves free from commercial influence. Ct. 1, ¶ 10. The IOC distributed instructions to IOC members and to candidate cities, including Salt Lake City, which among other things placed

limitations on the value of gifts and other benefits which could be given to IOC members by or on behalf of candidate cities. Ct. 1, ¶ 12. The SLBC formally agreed to comply with those instructions. Ct. 1, ¶¶ 17, 18.

From about February 1988 until about July 1999, defendants Welch and Johnson are alleged to have taken various actions "to misappropriate and misapply the monies and funds of the SLBC[] by diverting SLBC income, and by giving, offering and agreeing to give money and other material personal benefits to influence IOC members to vote for Salt Lake City to host the Olympic Winter Games and concealing from the SLBC[] * * * and others the true amount, nature and purpose of such monies and benefits." Ct. 1, ¶ 20. This alleged conspiracy encompassed violations of the Travel Act (18 U.S.C. 1952) and the mail and wire fraud statutes (18 U.S.C. 1341, 1343, 1346), as well as the fraudulent procurement of an immigration document (18 U.S.C. 1546). Ct. 1, ¶ 19.

Defendants' alleged activities included "(a) making direct and indirect payments of money and other things of substantial value; (b) making payments to IOC members and their relatives under the guise of sham contracts and consulting agreements; (c) making payments for tuition, living expenses and spending money for the children and relatives of IOC members; (d) making payments for medical expenses of IOC members and their relatives; and (e) making payments for

personal and vacation travel expenses of IOC members and their relatives." Ct. 1, ¶ 22. Defendants are alleged to have arranged to give approximately $1 million in unauthorized benefits to IOC members, including "(a) approximately $320,000 to Jean Claude Ganga of the Congo; (b) approximately $91,000 to Bashir Attarabulsi of Libya; (c) approximately $42,000 to Charles Mukora of Kenya; (d) approximately $20,000 to Zein Gadir of the Sudan; (e) approximately $78,000 to Un Yong Kim of South Korea; (f) approximately $195,000 to Rene Essomba of Cameroon; (g) approximately $3,000 to Austin Sealy of Barbados; (h) approximately $30,000 to Augustin Arroyo of Equador; (i) approximately $1,200 to Slobodan Filopovic of Yugoslavia; (j) approximately $99,000 to David Sibandze of Swaziland; (k) approximately $107,000 to Lamine Keita of Mali; (l) approximately $33,750 to Pirjo Haggman of Finland; (m) approximately $8,000 to Guirandou N'Daiye of the Ivory Coast; (n) approximately $5,000 to Anton Geesink of the Netherlands; and (o) approximately $20,000 to Sergio Santander-Fantini of Chile." Ct. 1, ¶ 23.

Among the methods defendants are alleged to have used to conceal and misrepresent these payments were "(a) creating and causing the funding of a sham program, the National Olympic Committee Program (NOC Program), which purported to provide athletes in underprivileged countries with training and

equipment; (b) making and causing to be made payments to IOC members in cash; (c) causing the SLBC[] to enter into sham contracts and consulting agreements; (d) causing many of the payments and benefits provided by the SLBC[] to IOC members and their relatives to be inaccurately recorded in various accounts on the books and records of the SLBC[]; (e) placing and causing to be placed false, fraudulent and misleading information in the books, financial statements and other financial records of the SLBC[]; and (f) failing to disclose and causing the failure to disclose material information in publicly-available documents." Ct. 1, ¶ 24.

Defendants also are alleged to have secretly funded the employment of an IOC member's son by a third party, and to have arranged for the fraudulent procurement of permanent resident alien status for him. Ct. 1, ¶ 25. In addition, defendants are alleged to have made secret payments to Alfredo La Mont, the United States Olympic Committee's Director of International Relations, to further the selection of Salt Lake City as the United States candidate city and to influence IOC members to select Salt Lake City to host the 2002 Olympic Winter Games. Ct. 1, ¶¶ 26-28. Defendants are further alleged to have solicited a cash donation of $131,000 that was not entered in the SLBC's records and was diverted to defendants' unreported uses. Ct. 1, ¶ 29, ¶ 30(18)-(21).

The Travel Act counts (Counts 2-5) allege defendants' use of

communications in interstate and foreign commerce with the intent to facilitate bribery that would violate Utah Crim. Code 76-6-508(a)(1). App. 54. As relevant here, the Utah statute is violated when "[a] person * * * without the consent of the employer or principal, contrary to the interests of the employer or principal * * * confers, offers, or agrees to confer upon the employee, agent, or fiduciary of an employer or principal any benefit with the purpose of influencing the conduct of the employee, agent, or fiduciary in relating to his employer's or principal's affairs." Section 76-6-508(1)(a); Addendum C, infra at 2.

The mail and wire fraud counts (Counts 6-15) allege that defendants "devised and intended to devise a scheme and artifice to defraud the [SLBC] and to obtain [its] money and property by means of material false and fraudulent pretenses, representations, and promises, and to deprive the SLBC [of its] intangible right to the honest services of the defendants and others." App. 55-58. As incorporated by reference to the allegations of the conspiracy count, the mail and wire fraud counts allege that the scheme to defraud involved defendants' bribery of IOC members and defendants' contrivances to prevent the SLBC Board of Trustees from learning about that use of its funds.

2. Defendants' motions to dismiss the indictment were referred initially to United States Magistrate Judge Ronald N. Boyce, who upheld the indictment

against all contentions in two Reports and Recommendations, filed on June 8 and June 27, 2001. Doc. No. 100-1 (6/8/01 R&R), App. 216-245; Doc. No. 120-1 (6/27/01 R&R), App. 246-263. On de novo review of those recommendations, after briefing and a hearing, the district court (Judge David Sam), dismissed the indictment in two stages.

First, in a July 16, 2001 order explained by an August 9, 2001 memorandum opinion, the court dismissed the Travel Act counts based on its alternative rulings that the Utah commercial bribery statute was not a valid predicate for a Travel Act prosecution and that the Utah statute was unconstitutionally ambiguous and vague as applied in this case. The court found that "analysis of [the Utah statute] in the context of the history and purpose of the Travel Act, interpretative Supreme Court opinion, lack of state prosecution, prior state application, and under the unique circumstances presented mandates the conclusion that Utah's commercial bribery statute is not a valid predicate for a prosecution in this instance." App. 324 (8/9/01 Mem. 6). The court reasoned that "[f]ederal prosecution of this case based upon Utah law does not advance the goals of the Travel Act," because "[a] fair reading of the indictment does not reflect that defendants are members of a criminal business enterprise, an organized syndicate or a 'crime family.'" App. 325 (Mem. 7). The court further reasoned that, since "Utah has elected not to

prosecute defendants for any state law violation," a federal attempt "unilaterally to 'aid' Utah in enforcing a Utah law under circumstances which defy characterization as 'organized crime'* * * is contrary to the purpose of the Travel Act." App. 326 (Mem. 8). The court also reasoned that "neither the history nor the language of the Travel Act would sanction an expansive interpretation that would jeopardize the balance of powers between state and federal governments when a continuous course of organized criminal conduct is not present and when there is no state enforcement to reinforce." App. 327 (Mem. 9). As an alternative ground for dismissing the Travel Act counts, the court found that "neither the language of [the Utah statute] nor its prior application gave [defendants] reasonable notice that their alleged actions were proscribed," and that "[t]he statute also is susceptible to arbitrary enforcement," and "therefore, is unconstitutionally vague as applied in this case." App. 333 (8/9/01 Mem. 15).

In its November 15, 2001 memorandum opinion and order, the court concluded that its dismissal of the Travel Act charges required dismissal of the other charges, because it could not "determine what influence, if any, the inclusion of the defective Travel Act charges with their reliance on Utah's commercial bribery statute may have had on the grand jury's decision to indict defendants for conspiracy, mail and wire fraud." App. 355 (11/15/01 Mem. 6). In the court's

view, "it is not feasible to purge the indictment of what in essence are intertwined defective allegations of unlawful bribery without substantively altering the terms of the indictment." App. 362 (Mem. 13).

The court rejected, however, defendants' challenges to the sufficiency of the mail and wire fraud counts to allege offenses. The court upheld the viability of all three alternative theories of mail/wire fraud liability: that defendants contrived a scheme to deprive SLBC of money, of its right to control how its property was used, and of its right to defendants' honest services. App. 363-369 (11/15/01 Mem. 14-20). The court also ruled that the mail/wire fraud counts sufficiently alleged the required intent to defraud. App. 370-374 (Mem. 21-25).

SUMMARY OF ARGUMENT

1. The Travel Act counts allege that defendants used communications in interstate and foreign commerce to facilitate bribery in violation of Utah Crim. Code 76-6-508. "Bribery" has a federal-law definition, encompassing "payments to private individuals to influence their actions" if the relevant State proscribes the conduct. Perrin v. United States, 444 U.S. 37, 46 (1979). Utah prohibits unauthorized payments to agents or fiduciaries made "with the purpose of influencing the conduct of the * * * agent[] or fiduciary * * * in relating to his * * * principal's affairs." Section 76-6-508(a)(1). Defendants' substantial

unauthorized payments to IOC members to influence their selection of the site for the Olympic Winter Games constituted bribery violating Utah law.

A. The district court erred in ruling that the Utah commercial bribery statute may not be used as a predicate for this Travel Act prosecution on the grounds that defendants' alleged conduct did not involve "organized crime" and that the State has elected not to prosecute. Perrin held that the statute reaches individual instances of commercial bribery without any organized crime component. This Court also has held that there is no organized-crime element in the Travel Act. See United States v. Davis, 780 F.2d 838, 843 (10th Cir. 1985). There is no federalism requirement for the state to prosecute the state offense or for state approval of the federal prosecution. The Travel Act offense is a federal offense, not a state offense. Perrin held that "[r]eliance on federalism principles * * * to dictate a narrow interpretation of 'bribery' is misplaced. * * * [S]o long as the requisite interstate nexus is present, the [Travel Act] reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance * * *" 444 U.S. at 50.

B. In determining whether Utah Crim. Code 76-6-508 proscribes defendants' alleged bribery of IOC members, a federal court must determine how the highest court of the State would resolve the matter. Utah prosecutors have no

authority to define the scope of the State's criminal laws by their enforcement decisions. In Utah, as in other States, the legislature establishes criminal proscriptions and the courts interpret their meaning and scope.

The Supreme Court of Utah would interpret Section 76-6-508 to apply to defendants' alleged conduct. By its terms, Section 76-6-508 proscribes conferring a "benefit" on an "agent" or "fiduciary" of a "principal," "without the consent" and "contrary to the interests" of the principal, "with the purpose of influencing the conduct" of the agent or fiduciary "in relating to his * * * principal's affairs." Section 76-6-508(1)(a). Subject to the government's factual proof, which must await trial, see United States v. Costello, 350 U.S. 359, 363 (1956), defendants' alleged bribery satisfied each element of this offense.

The government will prove that IOC members are the agents or fiduciaries of the IOC for the purpose of selecting the site of an Olympic Games, which is determined by the vote of the IOC members. The government will prove that defendants paid strategically important IOC members large sums of money to ensure that those members would vote for Salt Lake City as the site of the Games and with the intention that those members would lobby other IOC members on behalf of Salt Lake City. For example, defendants are alleged to have given $320,000 in unauthorized benefits to IOC member Jean Claude Ganga, which

included approximately $80,000 paid into Ganga's bank account. Ct. 1, ¶¶ 23(a), 30(27) - 30(30), 30(32) (App. 33, 40-41). Such payments were classic bribes. The government will further prove that defendants knew that they were engaged in unlawful conduct.

C. Section 76-6-508 is not unconstitutionally vague or ambiguous as applied to the circumstances alleged in the indictment. The "touchstone" of vagueness analysis is whether it was "reasonably clear at the relevant time that defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 266 (1997). To establish a violation of the Travel Act, the government must prove that defendants used the facilities of interstate and foreign commerce with the specific intent of furthering unlawful activity. Defendants' ignorance of the scope of Section 76-6-508 is no defense. But the government must prove that defendants knew that their payments to IOC members were unlawful, not merely unethical. See United States v. Hall, 536 F.2d 313, 329-331 (10th Cir.), cert. denied, 429 U.S. 919 (1976). That satisfies due process.

The district court applied an incorrect legal standard when it based its vagueness ruling on questions about application of the Utah statute to circumstances that are not involved in this case. "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in

light of the facts of the case at hand. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." United States v. Saffo, 227 F.3d 1260, 1270 (10th Cir. 2000) (internal quotation omitted), cert. denied, 121 S.Ct. 1608 (2001).

The Utah statute unambiguously proscribes the bribery alleged in this case. The district court's uncertainty whether the statute extends to mere "good will gifts" is irrelevant to evaluating defendants' as-applied challenge to the statute, because the indictment alleges payments in amounts far in excess of allowed gifts where those payments were made as bribes, not merely to cultivate good will. Likewise, the district court's concern that the statute might be applied to situations where the recipient of the benefit does not owe any duty to the principal with respect to the matter sought to be influenced does not apply to the situation here, where the object of the bribes was to influence a matter of preeminent concern to the IOC, the selection of the site for the Games.

2. The district court's dismissal of the mail and wire fraud counts, and the conspiracy count, depended on its dismissal of the Travel Act counts. The court upheld the sufficiency of the indictment to charge the mail/wire fraud offenses, but reasoned that the grand jury might not have indicted for those offenses if the Travel Act allegation had been absent from the indictment. The district court

applied the wrong legal standard and reached an erroneous result.

Even if the Travel Act counts were properly dismissed, the remaining counts survive. When some charges of an indictment are dismissed, the others survive if they are sufficiently alleged, regardless of whether the dismissed charges may have influenced the grand jury to indict on the other charges. See United States v. Miller, 471 U.S. 130, 136 (1985).

Consideration of the Travel Act evidence did not taint the grand jury's consideration of the fraud allegations. On the contrary, defendants' alleged payments to IOC members were part of their scheme to defraud the SLBC, and thus the evidence of their bribery was properly considered by the grand jury in its decision to indict on the mail/wire fraud charges. If the Travel Act charges had not been alleged, the same evidence would have been presented to the grand jury.

Moreover, the mail/wire fraud charges and the Travel Act charges are directed at different wrongdoing. The fraud charges required the grand jury to determine whether defendants breached their duties to the SLBC by failing to inform the SLBC Board of Trustees about the unauthorized use of SLBC property and by failing to properly record the use of that property in the SLBC's financial records. For example, the indictment alleges that defendants fraudulently induced the SLBC Board to approve an expenditure program ostensibly to purchase

sporting equipment for underprivileged athletes in Africa, which was actually intended and used by defendants as an accounting ruse to hide their bribery payments. Ct. 1, ¶¶ 24(a), 30(6)-30(10), 30(96), 30(98) (App. 34, 37-38, 53). The indictment also alleges that defendants solicited a large donation from an Olympic sponsor, insisted that it be in cash, and then, in airports and hotels, collected envelopes thick with currency, totaling $131,000, which was never recorded on the SLBC books. Ct. 1, ¶¶ 29, 30(14)-30(21) (App. 36, 38-39). Evidence of these and the many other alleged contrivances by which defendants defrauded SLBC of its property was a compelling basis for the grand jury to indict on the mail/wire fraud charges, without regard to the allegation that defendants violated the Utah commercial bribery statute.

Finally, the mail/wire fraud charges are not textually dependent on the Travel Act charges. The allegations of the mail/wire fraud counts, including the extensive incorporation by reference of the allegations of the conspiracy count, make only a single reference to "acts of bribery in violation of the laws of the State of Utah." Ct. 1, ¶ 21 (App. 32). The allegation that defendants' payments to IOC members were "bribery" was completely proper to allege as a manner and means of the conspiracy to commit the mail/wire fraud charges. Whether or not defendants' conduct violated the Utah commercial bribery statute, it was bribery

as commonly understood. It would have been proper to characterize defendants' conduct as bribery in presenting the case to the grand jury even if there had been no allegation of a Travel Act violation. Thus, assuming that the district court correctly dismissed the Travel Act counts, a fully sufficient remedy is redaction from the indictment of the Travel Act counts and of the allegation in the conspiracy count that the bribery was "in violation of the laws of the State of Utah." Ct. 1, ¶ 21 (App. 32).

ARGUMENT

I. THE UTAH COMMERCIAL BRIBERY STATUTE IS A PERMISSIBLE PREDICATE FOR THE TRAVEL ACT CHARGES

The indictment alleges bribery in violation of Utah criminal law. The Travel Act has no requirement that defendants' conduct involve organized crime or that the State would prosecute the offense. Utah courts would apply Section 76-6-508 to defendants' alleged conduct and, as so applied, it is not unconstitutionally vague or ambiguous.

A. Standard of Review

The sufficiency of the indictment is reviewed de novo, see United States v. Davis, 965 F.2d 804, 809 (10th Cir. 1992), cert. denied, 507 U.S. 910 (1993), and the allegations of the indictment are accepted as true for that purpose, see United

States v. Wood, 6 F.3d 692, 694 (10th Cir. 1993).

B. Allegations of a Travel Act Violation May Be Predicated on Conduct that Is "Bribery" in Violation of a State Misdemeanor Commercial Bribery Statute, Such as the Utah Statute Involved In this Case, Without Any Allegation That "Organized Crime" Is Involved or That the State Would Prosecute the Conduct.

The indictment alleges violation of the Travel Act, 18 U.S.C. 1952, as one of the object offenses of the conspiracy offense (Count 1) and as four substantive offenses (Counts 2-5). That statute makes it unlawful, inter alia, to "travel[] in interstate or foreign commerce or use[] the mail or any facility in interstate commerce, with intent to * * * facilitate the promotion, management, establishment, or carrying on of any unlawful activity," including "bribery * * * in violation of the laws of the State in which committed or of the United States," and "thereafter perform[] or attempt[] to perform * * * an act" to "facilitate the promotion, management, establishment, or carrying on of [that] unlawful activity." Section 1952(a) (Addendum C at 1). Bribery in violation of Utah Crim. Code 76-6-508 is alleged as the "unlawful activity" that defendants' intended to facilitate. Section 76-6-508 defines a misdemeanor offense when "[a] person * * * without the consent of the employer or principal, contrary to the interests of the employer or principal: * * * confers, offers, or agrees to confer upon the employee, agent, or fiduciary of an employer or principal any benefit with the purpose of influencing

the conduct of the employee, agent, or fiduciary in relating to his employer's or principal's affairs." Section 76-6-508(1)(a) (Addendum C at 2).

Perrin v. United States, 444 U.S. 37 (1979), held that "bribery" as a predicate "unlawful activity" under the Travel Act includes state misdemeanor commercial bribery offenses. 444 U.S. at 41-49. The Court rejected the contention that Travel Act "bribery" was restricted to common-law bribery, or bribery of public officials, but instead held that the term encompassed "the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961." Id. at 42. The Court found that "references in the legislative history to the purposes and scope of the Travel Act * * * indicate that Members, Committees, and draftsmen used 'bribery' to include payments to private individuals to influence their actions." Id. at 45-46. The Louisiana commercial bribery statute at issue in Perrin is comparable to the Utah statute involved in this case. See id. at 39 n.3. Therefore, absent some limitation on the scope of the Travel Act not articulated in the language of the Act or in Perrin, bribery that violates Section 76-6-508 may be the predicate for a Travel Act prosecution.

The district court, however, identified two additional requirements for use of the Utah statute as a predicate "unlawful activity." The court required a showing that defendants' conduct involved "organized crime" and that the State

would prosecute that conduct. App. 326-332 (8/9/01 Mem. 8-14). Contrary to the district court's reasoning, neither is a requirement for a Travel Act prosecution.

The district court correctly observed (App. 324-325 (Mem. 6-7)) that one principal purpose of the Travel Act is to combat organized crime. See United States v. Nardello, 393 U.S. 286, 291 (1969) ("Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.") (quoting from S. Rep. No. 644, 87th Cong., 1st Sess. 4 (1961)). The district court erred, however, in concluding that the indictment is defective because it does not allege "that defendants are members of a crime business enterprise, an organized syndicate or a 'crime family'" or "that they are involved in crime as a continuous course of conduct, [or] that they depend upon the fruits of crime for their livelihood * * *" App. 325-326 (8/9/01 Mem. at 7-8).

One alternative definition of Travel Act "unlawful activity" is "any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances * * *, or prostitution offenses." Section 1952(b)(i)(1). That definition encompasses, but is not limited to, the continuous

business enterprises of organized crime.[1] The district court's focus on the need to allege a "crime business enterprise" is misplaced, however. The definition of "unlawful activity" includes, in the alternative, other types of criminal activity without reference to a "business enterprise" and the indictment's allegation of "unlawful activity" did not rely on the "business enterprise" provision.

The definition of "unlawful activity" includes "extortion, bribery, or arson," Section 1952(b)(i)(2), and "any act which is indictable under subchapter II of chapter 53 of title 31, United States Code [31 U.S.C. 5311-5322 (currency and monetary transaction reporting)], or under section 1956 or 1957 of this title [money laundering]," Section 1952(b)(i)(3). All of the offenses identified in Subsections 1952(b)(i)(2) and (3) can be committed by an individual without

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[1] A "business enterprise" under the Travel Act need not involve "organized crime." See, e.g., United States v. Kahn, 415 U.S. 143, 144, 148 (1974) (Travel Act prosecution of individual bookmaker and his wife who operated two telephones from his residence); United States v. Davis, 780 F.2d 838, 843 (10th Cir. 1985) (Travel Act prosecution for "business enterprise" of manufacturing methamphetamine, although "there was no evidence of any element of organized crime or of an association of [defendants'] activities with a larger, ongoing enterprise"). Cases suggest that a "business enterprise" under Section 1952(b)(i)(1) must involve a "continuing course of conduct." E.g., Rewis v. United States, 401 U.S. 1056, 1059 n.6 (1971); United States v. Kendall, 766 F.2d 1426, 1434 (10th Cir. 1985), cert. denied, 474 U.S. 1081 (1986). The "unlawful activity" involved in this case – "bribery * * * in violation of the laws of the State in which committed" under Section 1952(b)(i)(2) – does not require a continuous course of conduct. See Perrin (isolated instance of commercial bribery). In any event, this case involves a course of conduct, not an individual bribe.

involvement of a "business enterprise." Defendants were charged with "bribery of various IOC members in violation of * * * Section 76-6-508." Cts. 2-5 (App. 54). That allegation satisfied the definition of "unlawful activity" included in Section 1952(b)(i)(2) and did not require any allegation of a "crime business enterprise."

In Perrin, two individuals, LaFont and Levy, attempted to bribe Willis, an employee of the Petty-Ray Geophysical Company, to steal confidential geological exploration data from his employer. LaFont and Levy intended to pay Willis a percentage of the profits of a corporation specifically organized to exploit the stolen data. Perrin was a consulting geologist brought in by the conspirators to evaluate the data. But Willis reported the scheme to the FBI and participated as a government informant until LaFont, Levy, and Perrin were apprehended. See 444 U.S. at 40. The case involved three individual co-conspirators undertaking to bribe a single employee, not "organized crime."

In the court of appeals, Perrin "urged that the Travel Act applied only to organized crime and that the single instan[ce] of commercial bribery in this case did not amount to organized crime." United States v. Perrin, 580 F.2d 730, 733 n.4 (5th Cir. 1978). The court of appeals rejected that argument, holding that "[m]embership in organized crime is not an element of the offense." Ibid. In his brief to the Supreme Court, petitioner Perrin made the broader arguments that

were embraced by the district court in the instant case. See Pet. Reply Br. in No. 78-959 at 15-18 (italics in original) ("Congress sought to *aid* local law enforcement officials not to pre-empt them from the field and not to encroach upon the power of the states to regulate economic and individual behavior. * * * [Allowing state commercial bribery statutes to serve as Travel Act predicate offenses] tips the balance decidedly in favor of federal intervention in areas of traditional state concern. It creates a federal felony out of acts bearing no particular relevance to the compelling national law enforcement interest, embodied in the Travel Act, of protection against and control of organized crime."). The Supreme Court decisively rejected these arguments. See 444 U.S. at 50 ("so long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement").[2]

This Circuit has explicitly held that there is no "organized crime" element to

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[2] Cf. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 248 (1989) ("The occasion for Congress' action [in enacting the RICO statute, 18 U.S.C. 1961-1968] was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as a focus, was not limited in application to organized crime."); United States v. Culbert, 435 U.S. 371 (1978) (rejecting contention that "although an activity may be within the literal language of the Hobbs Act [18 U.S.C. 1951], it must constitute 'racketeering' to be within the perimeters of the Act").

a Travel Act prosecution. See Davis, 780 F.2d at 843 ("While we recognize that the legislative history of the Travel Act indicates it was aimed at combating organized crime, it has been clearly established that its reach is not limited to that end."). Other circuits have reached the same conclusion. See United States v. Burchinal, 657 F.2d 985, 996 (8th Cir.), cert. denied, 454 U.S. 1086 (1981); United States v. Thordarson, 646 F.2d 1323, 1328 n.10 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); United States v. Polizzi, 500 F.2d 856, 874 n.20 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); United States v. Roselli, 432 F.2d 879, 885-886 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971); United States v. Barnes, 383 F.2d 287, 289 n.2 (6th Cir. 1967), cert. denied, 389 U.S. 1040 (1968). We have not found any court of appeals decision that has accepted the view adopted by the district court in this case, despite the significant number of Travel Act prosecutions, in addition to Perrin, that were premised on bribery violating state commercial bribery laws as the predicate "unlawful activity," but not involving "organized crime."[3]

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[3] See United States v. Patel, 32 F.3d 340 (1994) (individual attempted to pay an employee of a company disposing of property for the Resolution Trust Corporation to influence the employee's action in approving a sale); United States v. Dischner, 974 F.2d 1502 (9th Cir. 1992) (individual defendants received kickbacks for using their influence to obtain no-bid contracts for public works projects), cert. denied, 507 U.S. 923 (1993); United States v. Goodman, 945 F.2d 125 (6th Cir. 1991) (individual defendant bribed radio station program directors to

The district court also ruled that the decision of Utah prosecutors not to prosecute defendants' conduct is relevant to whether the Travel Act may be applied. Several propositions are suggested by the court's statements in this regard (App. 326-332 (8/9/01 Mem. 8-14)): first, that unless Utah would prosecute, defendants' conduct cannot be "in violation of the laws of the State in which committed" and therefore cannot be "unlawful activity" under the Travel Act; second, that Utah's decision not to prosecute indicates that Section 76-6-508 does not encompass defendants' conduct; and third, that federalism considerations require that the Travel Act may be applied only to "reinforce" state efforts to prosecute, and that there is no Utah interest to reinforce here. Contrary to the

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use musical recordings he was promoting); United States v. Werme, 939 F.2d 108 (3d Cir. 1991) (defendant bribed an employee of the primary contractor for construction of a nuclear power plant to influence the selection of the defendant's company as a subcontractor), cert. denied, 502 U.S. 1092 (1992); United States v. Fitzpatrick, 892 F.2d 162 (1st Cir. 1989) (bank loan officer accepted bribe to approve loan application); United States v. Covino, 837 F.2d 65 (2d Cir. 1988) (employee of cellular telephone company accepted bribes from contractor); United States v. Piccolo, 835 F.2d 517 (3d Cir. 1987) (employee of electrical power company accepted bribe to provide bid information to contractor), cert. denied, 486 U.S. 1032 (1988); United States v. Gullett, 713 F.2d 1203 (6th Cir. 1983) (partners in accounting firm accepted kickbacks from clients to use firm as conduit for improper financial transactions), cert. denied, 464 U.S. 1069 (1984); United States v. Seregos, 655 F.2d 33 (2d Cir. 1981) (kickback transaction between president of stevedoring company and executive of shipping company), cert. denied, 455 U.S. 940 (1982); United States v. Pomponio, 511 F.2d 953 (4th Cir. 1975) (payments to bank officer to influence his approval of loans), cert. denied, 423 U.S. 874 (1975).

district court's reasoning, the decisions of Utah prosecutors are not relevant in any of these respects to the question whether this Travel Act prosecution may proceed.

The Travel Act is a federal offense, not a state offense. The term "bribery" has a federal-law definition that encompasses "payments to private individuals to influence their actions." Perrin, 444 U.S. at 46. Such bribery is "unlawful activity" under the Travel Act if it violates the relevant State's criminal law, regardless of what label the State may attach to the crime. See Nardello, 393 U.S. at 295 ("extortion," as federally defined, is encompassed by the Travel Act if the conduct violates the State's criminal law even if the State labels the conduct "blackmail" rather than "extortion"). The Travel Act does not define "unlawful activity" as conduct that state prosecutors have elected to prosecute under the state's bribery laws, but rather as federally defined bribery in those instances where the state legislature has proscribed the conduct. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 488-493 (1985) (treble damage action by lie under 18 U.S.C. 1964(c) by "[a]ny person injured * * * by reason of a violation of" the RICO statute, without prior state conviction for the RICO predicate acts or prior federal conviction for the RICO violation, because "the term 'violation' does not imply a criminal sanction[,] * * * [i]t refers only to a failure to adhere to legal requirements," id. at 489).

Congress did not make prior state permission, process, or prosecution a requirement for a Travel Act prosecution, as it might have elected to do. Compare, e.g., 18 U.S.C. 228 (willful failure to pay state-ordered child support); 922(g)(1) (felon in possession of a firearm); 922(g)(9) (domestic-violence misdemeanant in possession of a firearm); 1071 (harboring person for whose arrest a warrant has been issued under state law); S. 625, 107th Cong., 1st Sess. § 7(a) (introduced Mar. 27, 2001) (proposed federal "hate crime" offense requiring State authorization before commencing federal prosecution) (Addendum C at 7).

Indeed, actual violation of the predicate state law is not a prerequisite for a Travel Act conviction. It is sufficient if a defendant's intended conduct would violate the state law, even if his actual conduct does not progress as far as an attempt offense under state law. See United States v. Jenkins, 943 F.2d 167, 173 (2d Cir.), cert. denied, 502 U.S. 1014 (1991); United States v. Griffin, 699 F.2d 1102, 1106 (11th Cir. 1983). Because "a violation of state law is not an element of the Travel Act, but rather serves a definitional purpose in characterizing the proscribed conduct," the elements of the predicate state law need not be alleged in the indictment. Davis, 965 F.2d at 809; see United States v. Gordon, 641 F.2d 1281, 1284 (9th Cir.), cert. denied, 454 U.S. 859 (1981).

In Utah, as in other States, the question whether conduct is "in violation of the laws of the State" depends on the proscription of the legislature, not the actions of state prosecutors; and the scope of the legislature's prohibition is determined by the courts of the state, not the prosecutors. See State v. Redd, 992 P.2d 986 (Utah 1999) (unprecedented application of a criminal statute upheld when conduct was encompassed by the plain meaning of the statute); State v. Hunt, 906 P.2d 311, 312 (Utah 1995) ("The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the law.") (citation omitted). When the question of the scope of a state statute is before a federal court, it is resolved by determining how the highest court of the State would resolve the matter, not how the executive branch of the State would do so. See Meridith v. Winter Haven, 320 U.S. 228, 237 (1943); Davis, 965 F.2d at 810-811; United States v. Gaudreau, 860 F.2d 357, 361 (10th Cir. 1989); see also Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by any agency but by the courts. * * * [W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

Federalism considerations do not require that a Travel Act prosecution be approved by state prosecutors nor do federalism considerations require any

demonstration that state prosecutors would elect to prosecute the conduct. As the Supreme Court articulated in Perrin, "[r]eliance on federalism principles * * * to dictate a narrow interpretation of 'bribery' is misplaced. * * * Rather, so long as the requisite interstate nexus is present, the [Travel Act] reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement. * * * Until statutes such as the Travel Act contravene some provision of the Constitution, the choice is for Congress, not the courts." 444 U.S. at 50.

We do not believe that a federalism barrier to federal prosecution would exist even if state prosecutors affirmatively objected to the Travel Act prosecution. In any event, the record in this case includes the representation by government counsel that, prior to bringing the Travel Act prosecution, federal prosecutors consulted with the Utah Attorney General's Office, and that Office had no objection to the Travel Act prosecution. See App. 299-300 (transcript of hearing). Although no federal interest in a Travel Act prosecution need be shown other than satisfaction of the elements of the offense, the federal interest in the instant prosecution is substantial. The prestige of the United States is implicated by the conduct charged against defendants, and the Olympics are an international, not a local, event. The United States has an interest in demonstrating that it will not

tolerate corruption in the competition for the selection of host cities for the Olympic Games.

The district court took the phrase "reinforce state law enforcement" used in Perrin, 444 U.S. at 50, as a holding that there must be a state policy favoring prosecution for the Travel Act to "reinforce." See App. 327 (8/9/01 Mem. 9). Perrin did not so hold. That phrase is purely incidental to the Supreme Court's holding that the language of the Travel Act does not impose any federalism limitation apart from the required nexus to interstate or foreign commerce. Just as the Supreme Court rejected the argument that there is an organized-crime prerequisite, the district court's suggestion that there must be a state policy favoring prosecution must be rejected based on the plain language of the statute.

The district court relied heavily on a district court decision, United States v. Ferber, 966 F. Supp. 90 (D. Mass. 1997). App. 329-332 (8/9/01 Mem. 11-14). In Ferber, a Travel Act prosecution was predicated on the bribery of a private financial consultant to state agencies. The district court granted a post-conviction judgment of acquittal to the extent the Travel Act counts relied on violation of the Massachusetts public-employee gratuity statute, which has as an element that the gratuity was received "for or because of any official act or act within his official responsibility." Mass. Gen. L. ch. 268A, § 3(b); 966 F. Supp. at 103. The court

held that this statutory language required an act involving "actual decision making authority," and concluded that the statute did not apply to a private consultant who merely gave advice to state decision makers. 966 F. Supp. at 105-106. The court ruled that the defendant's conduct could not be a predicate for a Travel Act prosecution because, although it was "bribery," it was not bribery "in violation of the laws of the State where committed." Id. at 101-107.

In contrast to the circumstance in Ferber, the Utah commercial bribery statute is not restricted to payments to public employees. Moreover, unlike the bribed consultant in Ferber, IOC members have actual decision making authority on behalf of the IOC to select the site for an Olympic Games. Although Ferber considered the prior state prosecutions under the state gratuity statute as an aid in determining how the statute should be interpreted, the case does not stand for the proposition that prior state prosecution of the activity at issue is a prerequisite for a Travel Act prosecution.

In the next section of this brief, we discuss how the Utah statute would be interpreted under principles established by the Supreme Court of Utah. Whether the Ferber court correctly applied the principles of statutory interpretation that would be applied by the Massachusetts Supreme Judicial Court, or made a correct interpretation of the Massachusetts gratuity statute, is irrelevant to determining the

scope of the Utah statute involved here.

C. The Supreme Court of Utah Would Construe the Utah Commercial Bribery Statute To Apply to Defendants' Alleged Conduct.

The Supreme Court of Utah applies a plain-meaning analysis to interpret Utah criminal statutes: "When we interpret statutes, our primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. We therefore look first to the statute's plain language. The best evidence of the true intent and purpose of the Legislature in enacting a law is the plain language of the law. We therefore need not look beyond a law's plain language unless we find some ambiguity in it." Evans v. State, 963 P.2d 177, 184 (Utah 1998). The Supreme Court of Utah "has a long history of relying on dictionary definitions to determine plain meaning." Redd, 992 P.2d at 990 (interpreting term in criminal statute by reference to Webster's Third International Dictionary). "Where we are faced with two alternative readings, and we have no reliable sources that clearly fix the legislative purpose, we look to the consequences of those readings to determine the meaning to be given the statute. Our clear preference is the reading that reflects sound public policy, as we presume that must be what the legislature intended." Ibid.

By its plain meaning, the Utah commercial bribery statute applies to the bribery alleged in the indictment. By its terms, Section 76-6-508, as pertinent here, proscribes offering, conferring, or agreeing to confer a "benefit" to an "agent" or "fiduciary of" a "principal," "without the consent" and "contrary to the interests" of the principal, "with the purpose of influencing the conduct" of the agent or fiduciary "in relating to his * * * principal's affairs." Section 76-6-508(1)(a) (Addendum C at 2). Subject to the government's factual proof, which must await trial, see United States v. Costello, 350 U.S. 359, 363 (1956), defendants' alleged conduct satisfied each element of this offense.

The statutory term "benefit" readily applies to the allegations in the indictment that defendants gave various IOC members over $1 million in cash and services. The district court expressed concern that it was uncertain whether the term extended to "good will gifts," which the court described as gifts "meant to encourage good feelings and influence the recipient to view the donor favorably" but which "do not rise to the level of bribery." App. 339 (8/9/01 Mem. 21). For the purpose of determining whether the alleged bribery is covered by Section 76-6-508, however, it is irrelevant whether the statute covers the conferral of benefits that are merely good will gifts. It is plain that the statute covers the substantial cash payoffs allegedly made by defendants as bribes or attempted bribes to IOC

members.

The statutory terms "agent" and "principal" describe the relationship of IOC members to the IOC with respect to the selection of the site for the Olympic Games. Broadly accepted definitions of these terms describe a relationship where one person, the agent, is granted authority by another, his principal, to act on behalf of the principal with respect to a particular matter.[4] The indictment alleges that the IOC selects its members, who pledge to comply with the Olympic Charter and rules issued by the IOC. Ct. 1 ¶¶ 9-10 (App. 28). The indictment further alleges that one function of the IOC is to select the site of an Olympic Games and that IOC members perform that function by voting in an election for the site of the Games. Ct. 1, ¶¶ 8, 11 (App. 27, 28). Subject to factual proof at trial that an IOC member and the IOC satisfy the applicable definition of the agent/principal

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[4] Webster's Third International Dictionary (the source employed by Supreme Court of Utah in Redd) defines "agent" to include "one who acts for or in the place of another by authority from him," id. at 40; and "principal" to include "the person from whom an agent's responsibility derives," id. at 1802. Black's Law Dictionary, Seventh Edition, defines "agent" to include "[o]ne who is authorized to act for or in place of another," id. at 64, and "principal" to include "[o]ne who authorizes another to act on his or her behalf as an agent," id. at 1210. The Restatement of the Law Second, Agency 2d § 1 defines the relevant terms as follows: "(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and be subject to his control, and consent by the other to so act. (2) The one for whom action is taken is the principal. (3) The one who is to act is the agent."

relationship with respect to the selection of the site of an Olympic Games, the circumstances of this case satisfy this element of the Utah statute. Under the facts of this case, an IOC member may also be a "fiduciary of" the IOC within the meaning of Section 76-6-508 for purposes of selecting the site of the Games, insofar as the Olympic Charter reposes final decision making authority for the selection of the Games in the election choice made by IOC members.

The benefit must be conferred on the agent "without the consent [and] contrary to the interests of the employer or principal." The indictment alleges that the IOC members took an oath to respect the provisions of the Olympic Charter, to keep themselves free from commercial influence, and to defend in all circumstances the interests of the IOC. Ct. 1, ¶ 10 (App. 28). It further alleges that in connection with the selection of the host city for the Olympic Winter Games, the IOC distributed instructions to IOC members, which among other things placed limitations on the value of gifts and other benefits which could be given to IOC members by or on behalf of candidate cities. Ct. 1, ¶ 12 (App. 28). Those allegations were incorporated by reference into the Travel Act counts, and they are sufficient, if proved, to show that the large bribes defendants' allegedly gave to IOC members were "without the consent" and "contrary to the interests of" the IOC.

The conferral of the benefit must be "with the purpose of influencing the conduct of the employee, agent, or fiduciary in relating to his employer's or principal's affairs." The indictment alleges that IOC members select the site of the Olympic Games and that defendants bribed IOC members to influence their selection. Ct. 1, ¶ 11, 22 (App. 28, 32). Those allegations, if proved, would satisfy this element of the Utah statute.

The district court expressed concern that this plain-meaning interpretation would criminalize conduct that did not in fact change the decision making of the bribed IOC members, or change the ultimate outcome in the IOC's selection of the site for the Games. The district court would add an element not present in the language: that the employer or principal must suffer a detriment, not merely by the agent's breach of his duty of loyalty, but also as a consequence of the ultimate decision made by the agent. App. 341-342 (8/9/01 Mem. 23-25). The court erroneously believed its concern was supported by the dissenting opinion in United States v. Parise, 159 F.3d 790 (3d Cir. 1998). See App. 341-342 (8/9/01 Mem. 23-24).

In Parise, a RICO conviction (18 U.S.C. 1962(c)) was based on bribes paid to a maritime union employee to refer injured seamen to a particular law firm to handle their claims. The majority in Parise applied the plain meaning of the

Pennsylvania commercial bribery statute, as interpreted by Pennsylvania case law, to conclude that the statute required an employee or agent to maintain "an undivided loyalty to his principal" and that the duty of loyalty is breached when the employee or agent "receives money from third parties in return for acting on their behalf." 159 F.3d at 800 (quoting from Commonwealth v. Bellis, 399 A.2d 397, 400 (Pa. 1979)). The dissent agreed that this was the purpose of the statute, but disagreed with the majority's result, because the employer in Parise, the maritime union, was completely disinterested whether injured union members were referred to any particular law firm, and thus there was no showing of any breach of duty. See 159 F.3d at 806-809 (Garth, J., dissenting). The basis for the dissent in Parise is absent in the instant case, however, because selection of the site for the Olympic Games was of preeminent interest to the IOC.

Both the syntax and provenance of the Utah statute clarifies that the conferral of the benefit must be "contrary to the interest" of the principal, but the ultimate decision of the agent need not be. By its placement and punctuation in the statute, the phrase "contrary to the interests of the employer or principal" syntactically modifies the circumstances of the conferral of the benefit, not the ultimate action of the recipient. See Addendum C at 2. Like other commercial bribery statutes, the Utah statute protects against corruption of an agent's duty of

loyalty to his principal, not just against financial injury to the principal. See Parise, 159 F.3d at 804-805 (Garth, J., dissenting) ("Courts interpreting the 'in relation to the affairs' language in the century since commercial bribery statutes were first enacted have held universally that the core of the offense is the breach of an agent's duty of loyalty.").

The Supreme Court of Utah would interpret the Utah commercial bribery statute to encompass defendants' alleged bribery of IOC members. That Court would apply a plain-meaning analysis at least as broad as would be applied to the interpretation of a federal statute by a federal court. Redd well illustrates that approach. The Redds were given permission to be on what they thought was private property but were not given permission to dig. Yet they excavated an Anasazi ruin. They dug in a kiva, which is a ceremonial building, and in a midden, which is a refuse mound. They uncovered some human bones and placed them aside. Id. at 988. The Redds were charged under Utah Crim. Code 76-9-704(1)(a) (1975), which provided: "(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully: (a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it[.]" 992 F.2d at 988 n.2, 990. The charge was dismissed by the magistrate on the ground that "[t]here is no evidence

that [the defendants] destroyed, concealed or removed a body or even a bone. The most that can be said is that they may have moved as many as seventeen bones a few feet. This is not removal, concealment or destruction." 992 P.2d at 989 (quoting from magistrate's ruling, emphasis omitted). The State took an interlocutory appeal to the court of appeals, which certified to the Supreme Court of Utah the question whether the charge was properly dismissed. Id. at 989-990.

The Supreme Court of Utah first determined that in the statutory phrase "removes a dead body" the term "removes" encompassed defendants' actions. Applying a dictionary definition, the Court accepted that the definition included "to change or shift the location" or "to move by lifting," and held that "when the Redds took the bones out of the ground and moved them to the back dirt piles, they 'removed' them within the plain meaning of the statute." Id. at 990.

The Court then addressed whether the Redds' removal of individual human bones came within the statutory definition of the offense: "removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it." Utah Crim. Code 76-9-704(1)(a) (1975); 992 P.2d at 990. The Court reasoned that the statute could be given two interpretations: either it prohibited "only (i) the removal, concealment, or failure to report the finding of an intact dead body or (ii) the destruction of an intact dead

body or a part of it," and therefore did not apply to the removal of individual human bones; or alternatively the statute prohibited "(i) the removal, concealment, failure to report the finding of, or the destruction of (ii) a dead body or any part of it." Ibid. The Court resolved the choice between these two possible interpretations by applying the following principle: "Where we are faced with two alternative readings, and we have no reliable sources that clearly fix the legislative purpose, we look to the consequences of those readings to determine the meaning to be given to the statute. Our clear preference is the reading that reflects sound public policy, as we presume that must be what the legislature intended." Ibid. Applying this principle, the Court reasoned that "the results produced by the first of the two readings proposed, which would not reach the removal, concealment, or failure to report the finding of parts of bodies * * * is not in accord with any sound public policy" whereas the second reading advances "the broader public policy" to "protect the partial remains of many with whom people today can readily identify, such as pioneers buried long ago in crude graves, or of war dead, or of victims of horrendous accidents, or crimes." Id. at 991. The Court accepted this expansive reading because of "the soundness of the broader public policy [the] interpretation advances," even though "it may be that reading this statute as protecting partial remains of a thousand-year-old Anazazi will not accord with the expectations of

some persons." Ibid.

It thus appears that the Supreme Court of Utah would apply the Utah commercial bribery statute to circumstances that had not previously been subject to prosecution if such an application reflected a reasonable interpretation of the statutory language and would advance a broader public policy. Construing Section 76-6-508 to reach the bribery of IOC members to influence their selection of the site of the Olympic Games would accord with the plain meaning of the statute and further the broad public policy of preventing outsiders from inducing an agent or fiduciary to breach his duty of loyalty to his principal. Following the guidance of Redd, there is no reason to conclude that the Supreme Court of Utah would interpret Section 76-6-508 to exempt defendants' alleged bribery.

The district court's reliance (App. 344-345 (8/9/01 Mem. 26-27)) on the rule of lenity was misplaced both because there is no ambiguity in the plain meaning of the statute and because the Utah legislature has instructed the courts not to construe Utah's criminal laws strictly against the State and in favor of the defendant. See Utah Crim. Code 76-1-106 ("The rule that a penal statute is to be strictly construed shall not apply to this [criminal] code, any of its provisions, or any offense defined by the laws of this state.") (Addendum C at 3); State v. Christensen, 20 P.2d 329 (Utah 2001) (interpreting phrase "14 years of age or

older, but not older than 17" in statutory rape provision to include 17 year olds until their 18th birthday, and distinguishing contrary interpretation of courts of other States on ground that those other courts applied the rule of lenity). Utah thus applies a broader interpretive approach than would be applied in federal courts to the interpretation of federal statutes, where statutes likewise are interpreted in accordance with their plain meaning, but genuine ambiguity is resolved in favor of defendant, not in favor of broader public policy. See, e.g., Ladner v. United States, 358 U.S. 169, 177-178 (1958); United States v. Wilson, 10 F.3d 734, 736 (10th Cir. 1993), cert. denied, 511 U.S. 1057 (1994).

D. As Applied to Defendants' Alleged Conduct, the Utah Commercial Bribery Statute Is Not Unconstitutionally Vague or Ambiguous.

The district court ruled that if the Utah commercial bribery statute were construed to apply to defendants' alleged conduct it would violate due process because the statute did not provide defendants with fair notice that such conduct was criminal. App. 332-346 (8/9/01 Mem. 14-28). The district court erred, however, in considering the possible ambiguity of the statute as applied to conduct different than the conduct alleged in the indictment. Defendants may assert a due process challenge only to the Utah statute as applied in this case, that is, bribery of IOC members to influence their votes for the site of the Olympic Winter Games.

As applied to defendants' alleged conduct, the statute is not unconstitutionally vague or ambiguous.

This Court has recognized that "[t]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Saffo, 227 F.3d at 1270 (quoting from Kolender v. Lawson, 461 U.S. 352, 357 (1983)). "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Saffo, 223 F.3d at 1270 (quoting from Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982)) (internal citations and quotations omitted). The "touchstone" of vagueness analysis is whether it was "reasonably clear at the relevant time that defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 266 (1997).

Under these principles, defendants' due process vagueness challenge to the Utah statute is restricted to the question whether the statute is unconstitutionally vague as applied to the conduct alleged in this case, which is defendants' bribery of IOC members by giving them large sums of money, far beyond the amount of

gifts permitted by IOC rules, for the purpose of influencing their votes in the selection of the site for the Olympic Games.

Conviction under the Travel Act requires the government to prove that defendants used the facilities of interstate or foreign commerce with the specific intent to further the unlawful activity alleged in the indictment. See, e.g., United States v. Hall, 536 F.2d 313, 329-330 (10th Cir. 1976).[5] Defendants need not have known what statute they were violating, but the government must prove that defendants' knew that their bribery of IOC members was unlawful. See Bryan v. United States, 524 U.S. 184, 196 (1998); United States v. Reddick, 203 F.3d 767, 770 (10th Cir. 2000); United States v. Blair, 54 F.3d 639, 643 (10th Cir.), cert. denied, 516 U.S. 883 (1995).[6] The Travel Act's mens rea requirement completely

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[5] See also United States v. Neuhausser, 241 F.3d 460, 473 (6th Cir.), cert. denied, 122 S.Ct. 181 (2001); United States v. James, 210 F.3d 1342, 1345 (11th Cir. 2000); United States v. Cerone, 830 F.2d 938, 947 (8th Cir. 1987), cert. denied, 486 U.S. 1006 (1988); United States v. Smith, 789 F.2d 196, 203 (3d Cir.), cert. denied, 479 U.S. 1017 (1986); United States v. Markowski, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986); Perrin, 580 F.2d at 737; United States v. Polizzi, 500 F.2d 856, 876-877 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

[6] In Hall, this Court described the jury instructions in the case as requiring that "the government must prove that the accused knowingly acted with intent to promote or to carry on or facilitate the promotion and carrying on of the activity of bribery of John Rogers, an Oklahoma public officer, an activity which the accused knew to be unlawful under Oklahoma law, such intent being determined from all the facts in the case." 536 F.2d at 329-330. Although the Court referred to

defeats any claim that the Utah statute, as applied in this case, is unconstitutionally vague or ambiguous. See Saffo, 227 F.3d at 1270 ("The evidence produced at trial demonstrates that Saffo had knowledge of the illegality of her activities, and thus this is not a situation where she could not reasonably understand that her contemplated conduct is proscribed.") (punctuation modified, quotation omitted).

Defendants' as-applied challenge must be evaluated in the precise context of this Travel Act prosecution. But even if defendants were challenging a Utah prosecution of their bribery under Section 76-6-508(1)(a), their due process challenge would fail. See Gaudreau, 860 F.2d at 363 (10th Cir.) ("The [Colorado commercial bribery statute] prohibits bribery, a concept well understood by the

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"Oklahoma law," there is no suggestion that, contrary to the general rule that ignorance of the law is no defense, the accused in a Travel Act prosecution must have known the specifics of the law he was violating. See United States v. Barbieri, 614 F.2d 715, 717-719 (10th Cir. 1980) (discussing government's proof that defendants traveled interstate with "the intent before the trip to establish an interstate prostitution network" without suggesting that defendants had to be aware of any details of the prostitution laws in the States involved); United States v. Hawthorne, 356 F.2d 740, 742 (4th Cir. 1965) ("[w]e do not think the [Travel Act] requires proof that the defendant knew that he was violating the Indiana law") (cited with approval in Dillon v. United States, 391 F.2d 433, 435 (10th Cir.), cert. denied, 393 U.S. 889 (1968)), cert. denied, 384 U.S. 908 (1966). In Hall, the defendant accepted that "ignorance of the law is no defense" in arguing that he should nevertheless have received an instruction that his good faith efforts to comply with the restrictions of the Oklahoma bribery "may be considered by the jury * * * in determining whether or not the accused acted with specific intent to disobey or to disregard the state law." 536 F.2d at 329. This Court held that such a good-faith instruction was unnecessary on the facts of the case. Id. at 329-330.

ordinary person. Although an ordinary agent or corporate officer may not know exactly the outer boundaries of his duty of loyalty in other contexts, when he accepts money or property for compromising the interests of his principal he should know that he is violating the statute.") .

The district court's concern that it is unclear whether the statute applies to "expressions of courtesy such as good will gifts," App. 339 (Mem. 21), is not relevant to a prosecution based on the alleged payments of about $1 million in bribes. For example, the indictment alleges that defendants sought to bribe IOC member Jean Claude Ganga of the Congo with approximately $320,000 in unauthorized benefits, including approximately $80,000 deposited into Ganga's bank account at the First Security Bank in Salt Lake City and over $100,000 in airline tickets for Ganga and six of his relatives to fly to various destinations around the world. Ct. 1 ¶¶ 23(a), 30(22) - 30(34) (App. 33, 39-41). If the distinction between "good will" gifts and the bribes alleged in the indictment remains a concern at trial, the jury may receive an instruction similar to the one approved by the First Circuit in United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996): "[T]he defendant has not violated the bribery component of the Travel Act * * * if his intent was limited to the cultivation of business or political friendship [with the recipient]. Only if instead or in addition, there is an intent to cause the

recipient to alter [his] official acts may the jury find * * * the bribery predicate of the Travel Act." Id. at 741.

The district court's concern (App. 341-342 (Mem. 23-24)) that the statute might be applied to situations, like that present in the Parise case, where the recipient of the benefit does not owe any duty to the principal with respect to the matter sought to be influenced, is not relevant here because IOC members had such a duty to the IOC. Finally, the district court's uncertainty (App. 343 (8/9/01 Mem. 25) whether the phrase "contrary to the interests of the employer or principal" refers to conferral of the benefit or the ultimate action taken by the agent or fiduciary is readily resolved, as discussed above, by the syntax and provenance of the statutory language.

The court of appeals in Perrin explicitly rejected a vagueness challenge to the Louisiana commercial bribery statute, which is very similar to the Utah commercial bribery statute. See 580 F.2d at 735 (citing to other cases upholding commercial bribery statutes against vagueness challenges). See also United States v. Seregos, 655 F.2d 33, 35 (2d Cir. 1981) (Travel Act prosecution could be based on violation of New York commercial bribery statute even though at time of offense Second Circuit had ruled (prior to Perrin) that the New York statute was not a valid predicate), cert. denied, 455 U.S. 940 (1982); United States v. Starks,

157 F.3d 833, 839-840 (11th Cir. 1998) (rejecting vagueness challenge to federal Medicare anti-kickback statute, 42 U.S.C. 1320a-7b); United States v. Moody, 977 F.2d 1420, 1424-1425 (11th Cir. 1992) (rejecting vagueness challenge to 18 U.S.C. 201(c)(2), which prohibits giving witnesses "anything of value * * * for or because of the[ir] testimony under oath"); United States v. Kelly, 973 F.2d 1145, 1151-1152 (5th Cir. 1992) (rejecting vagueness challenge to 18 U.S.C. 215, which prohibits commercial bribery of employees or agents of financial institutions).

These same considerations resolve the district court's concern (App. 333 (8/9/01 Mem. 15) that the Utah statute "is susceptible to arbitrary enforcement." See Gaudreau, 860 F.2d at 363-364.

II. THE DISTRICT COURT ERRED IN DISMISSING THE CONSPIRACY AND MAIL AND WIRE FRAUD CHARGES

The district court upheld the sufficiency of the mail and wire fraud counts to allege those offenses, and thus the sufficiency of the conspiracy count to the extent it relied on the mail/wire fraud object offenses. App. 363-374 (11/15/01 Mem. 14-25). The dismissal of the Travel Act counts was the foundation for the court's dismissal of the other counts. If the district court erred in dismissing the Travel Act counts, the court's rationale for dismissing the other counts disappears. But even if the court was correct with respect to the Travel Act counts, it was error to

dismiss the other counts because the indictment remains valid as to them.

A. Standard of Review

The district court's dismissal of the indictment will be reviewed for an abuse of discretion. See United States v. Smith, 13 F.3d 1421, 1425 (10th Cir.), cert. denied, 513 U.S. 878 (1994).

B. Even If the Travel Act Counts Were Properly Dismissed, The District Court Erred in Dismissing the Conspiracy Count And the Mail/Wire Fraud Counts.

The district court reasoned that the indictment must be dismissed because "[t]he court cannot determine what influence, if any, the inclusion of the defective Travel Act charges with their reliance on Utah's commercial bribery statute may have had on the grand jury's decision to indict defendants for conspiracy, mail and wire fraud." App. 355 (11/15/01 Mem. 6). That was not the correct legal standard. "As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime." United States v. Miller, 471 U.S. 130, 136 (1985).

In Miller, the indictment charged a mail fraud scheme by which Miller defrauded his insurer both by consenting to a burglary in advance and by later

lying about the value of the loss. The government elected to proceed only on the latter theory. The court of appeals vacated the conviction, because it was "quite possible that the grand jury would have been unwilling or unable to return an indictment based solely on Miller's exaggeration of the amount of his claimed loss even though it had concluded that an indictment could be returned based on the overall scheme involving a use of the mail caused by Miller's knowing consent to the burglary." 471 U.S. at 134 (quoting from court of appeals opinion). The Supreme Court held, however, that proceeding on only one of the theories presented to the grand jury did not violate Miller's rights because the indictment was sufficient to state an offense based on that one theory, even if the grand jury was influenced to indict because of the allegations of the greater charge. Id. at 135-145. Miller allows the mail/wire fraud charges in the instant case to survive dismissal of the Travel Act charges. See United States v. McVeigh, 153 F.3d 1166, 1195-1196 (10th Cir. 1998) (although indictment charged that defendant acted with "intent to kill," it was not an element of the offense and the government was not required to prove it, although it may have been a factor in the grand jury's indictment), cert. denied, 526 U.S. 1007 (1999); United States v. Sullivan, 919 F.2d 1403, 1435 (10th Cir. 1991) (conspiracy indictment remains valid although "one of the alleged means of committing the offense is erroneously pleaded"), cert.

denied, 506 U.S. 900 (1992); United States v. Mobile Materials, 881 F.2d 866, 874 (10th Cir. 1989) (defendant's substantial rights are not prejudiced when he "is convicted upon evidence which tends to show a narrower scheme than that contained in the indictment, provided that the narrower scheme is fully included within the indictment"), cert. denied, 493 U.S. 1043 (1990). Where one charge of the indictment is deemed deficient in some respect, it is proper for the district court to delete the charge from the indictment and proceed with the remaining charges. See Hall, supra, 536 F.2d at 318-320.

The mail/wire fraud charges do not rely in any substantial way on an allegation that defendants violated the Utah commercial bribery statute. Even in the absence of a Travel Act charge, it would be permissible and appropriate under the circumstances of this case to allege that defendants committed bribery as an aspect of their scheme to defraud SLBC. Whether or not defendants violated the Utah commercial bribery statute, they engaged in bribery as commonly understood, see Perrin, 444 U.S. at 41-46, and it would be proper for the grand jury to consider their conduct in that light. Assuming that the district court correctly dismissed the Travel Act counts, a fully sufficient remedy is redaction of the conspiracy allegation that the bribery was "in violation of the laws of the State

of Utah." Ct. 1, ¶ 21 (App. 32).[7]

The mail/wire fraud charges are directed at different wrongdoing by defendants than the Travel Act charges. The Travel Act charges involve defendants' bribery of IOC members to breach their duty of loyalty to the IOC. The mail/wire fraud charges involve defendants' scheme to defraud the SLBC. Even assuming that defendants' misuse of SLBC money to pay bribes did not violate Utah criminal law, it is alleged that their conduct breached a duty defendants owed to the SLBC Board of Trustees.

The method of the defendants' alleged criminal conduct also is different. The Travel Act charges are predicated on defendants making payments to IOC

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[7] Miller dictates that the grand jury's thought processes are not to be considered, but if they were, the "spillover" effect of invalid counts might be assessed in the same way a court would assess a claim of spillover prejudice after conviction on multiple counts when some counts of conviction are set aside. "In cases where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover." United States v. Wapnick, 60 F.3d 948, 954 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996). See United States v. Naiman, 211 F.3d 40, 49-50 (2d Cir. 2000) (reversal of embezzlement and bribery convictions did not require reversal of convictions for mail fraud and misapplication of funds); United States v. Morales, 185 F.3d 74, 82-83 (2d Cir. 1999) (reversal of RICO counts did not require reversal of Hobbs Act counts), cert. denied, 529 U.S. 1010 (2000); United States v. Weiner, 3 F.3d 17, 22 (1st Cir. 1993) (dismissal of mail fraud and some RICO counts prior to verdict did not require a new trial on remaining RICO counts); United States v. Odom, 858 F.2d 664, 666-667 (11th Cir. 1988) (dismissed mail fraud charges did not require reversal of election fraud charges).

members "without the consent of" and "contrary to the interests of" the IOC "with the purpose of influencing the conduct" of those IOC members in voting on the site of the Games. Section 76-6-508(1)(a). The mail/wire fraud charges are predicated on defendants' "scheme and artifice to defraud" SLBC "and to obtain [SLBC's] money and property by means of material false and fraudulent pretenses, representations, and promises." Counts 6-15 (App. 55-58). The mail/wire fraud charges focus on defendants' contrivances to keep material information from the SLBC Board of Trustees about how its money was spent.

For example, the indictment alleges that defendants fraudulently induced the SLBC Board of Trustees to approve an expenditure program ostensibly to purchase sporting equipment for underprivileged athletes in Africa, which was actually intended and used by defendants as an accounting ruse to hide their bribery payments to IOC members. Ct. 1, ¶¶ 24(a), 30(6)-30(10), 30(96), 30(98) (App. 34, 37-38, 53). The indictment also alleges that defendants directed SLBC employees to falsely report bribes in the SLBC books as travel reimbursements. Ct. 1, ¶¶ 30(24), 30(36), 30(66), 30(87) (App. 40, 42, 47, 51). It further alleges that defendants used phony contracts and invoices to divert $68,000 in SLBC funds to an outside company as part of a scheme fraudulently to obtain resident alien status for the son of an IOC member. Ct. 1, ¶¶ 25, 30(51)-30(61) (App. 34-

35, 44-46). The indictment also alleges that defendants solicited a large donation from an Olympic sponsor, insisted that it be in currency, and then, in airports and hotels, collected envelopes bulging with cash, totaling $131,000, which was never recorded on the SLBC books. Ct. 1, ¶¶ 29, 30(14)-30(21) (App. 36, 38-39). These were just some of defendants' contrivances to defraud SLBC of its property.

Finally, the mail/wire fraud charges are not textually dependent on the Travel Act charges. The allegations of the mail/wire fraud counts, including the extensive incorporation by reference of allegations from the conspiracy count, make only one direct reference to "acts of bribery in violation of the laws of the State of Utah," in paragraph 21 of Count 1 (App. 32). The detailed allegations of unauthorized payments and benefits defendants gave to IOC members, and the allegations of defendants' contrivances to keep from the Board of Trustees material information about how the SLBC's money was spent, do not refer even once to violation of the Utah commercial bribery statute. Ct. 1, ¶¶ 22-30 (App. 32-53). The "limitations on the value of gifts and other benefits which could be given to IOC members by and on behalf of candidate cities" (Ct. 1, ¶ 12 (App. 28)), which the SLBC "agreed * * * to abide by" (Ct. 1, ¶ 17 (App. 30)), were established by the IOC rules, not the Utah commercial bribery statute. And the legal duty defendants had to avoid "willfully misapplying any of the monies" of

SLBC and to avoid "knowingly making and concurring in the making and publishing of any written report, exhibit, and statement of the corporation's affairs and pecuniary condition containing any material statement which was false" (Ct. 1, ¶ 7 (App. 27)) did not arise under the Utah commercial bribery statute. Quite simply, as a consequence of dismissal of the Travel Act charges, a phrase of a few words could be excised from paragraph 21 of Count 1 and the rest of the allegations of the mail/wire fraud charges, including those incorporated by reference, could remain completely intact, as could the substance of those charges.

The district court relied exclusively on United States v. D'Alessio, 822 F. Supp. 1134 (D.N.J. 1993). App. 354-356 (11/15/01 Mem. 5-7). That reliance was misplaced. In D'Alessio, a county sheriff solicited contributions from the public for his personal use. It was undisputed that under New Jersey law public office holders were generally permitted to solicit certain contributions and receive gifts under certain circumstances. The indictment alleged, however, that a state court rule prohibited sheriffs from soliciting or receiving such personal gifts. See id. at 1138. The district court determined that because the state court rule did not apply to county sheriffs it was not an appropriate basis for alleging a breach of duty and fraud by the sheriff. The court found that the mail fraud charges "relie[d] heavily," were "centrally based," and were "fundamentally dependent" on an alleged duty of

the sheriff not to solicit gifts, a duty that did not exist. The court dismissed all the fraud charges because there was "a distinct and reasonable possibility" that the inapplicable alleged duty "infected" all theories of mail fraud liability. Id. at 1144-1146. As D'Alessio was described (and distinguished) by its own Circuit, it was "a case in which the counts of the indictment were very difficult to disentangle." United States v. Serafini, 233 F.3d 758, 767 n.12 (3d Cir. 2000). See also Lurie v. Wittner, 228 F.3d 113, 132 n.10 (2d Cir. 2000) (distinguishing D'Allesio because in that case "[v]iolation of the New Jersey court rule was thus the *sine qua non* of the mail fraud charge; if the court rule did not apply to sheriffs, then the predicate for the mail fraud charge did not exist"), cert. denied, 121 S.Ct. 1404 (2001).

We question whether D'Alessio correctly applied the principles for determining whether a redacted indictment may survive dismissal of one theory of prosecution. But even if it did, the circumstances of the instant case are substantially different. Here the source of defendants' duty to refrain from unauthorized use of SLBC property and to avoid material misstatements in the SLBC records was not the Utah commercial bribery statute. Their duty arose under Utah corporation law, which "prohibited any officer of a corporation from willfully misapplying any of the money, funds and credit of the corporation; [and]

from making any false entry in any book, report, and statement of the corporation" (Ct. 1, ¶ 7 (App. 27)), as well as from SLBC's correlate "right to be free of actual and potential economic harm, and the right to have its business affairs conducted honestly, impartially, in compliance with the laws of the United States, of the State of Utah and of other states, and free from deceit, corruption, fraud, and dishonesty" (Ct. 1, ¶ 4 (App. 27)). Even under the analysis of D'Alessio, the mail/wire fraud charges are not in any sense "fundamentally dependent" on a violation of the Utah commercial bribery statute. There is no "distinct and reasonable possibility" that the alleged violations of the Utah commercial bribery statute "infected" the mail/wire fraud charges.

STATEMENT RESPECTING ORAL ARGUMENT

The government believes that oral argument would assist the Court in its decision of this case in light of the complexity and importance of the issues presented.

CONCLUSION

For the reasons stated above, the district court's dismissal of the indictment should be reversed and the case remanded for trial.

Respectfully submitted.

JOHN C. KEENEY
Acting Assistant Attorney General
Criminal Division

RICHARD N. WIEDIS
Senior Trial Attorney, Fraud Section
JOHN W. SCOTT
Senior Trial Attorney, Public Integrity Section
Criminal Division

RICHARD A. FRIEDMAN
Attorney
Appellate Section, Criminal Division
United States Department of Justice
Room 6122
601 D Street, N.W.
Washington, D.C. 20530
202-514-3965
FAX 202-305-2121

January 23, 2002

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) IN CASES NOS. 01-4170, 01-

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is set in Times New Roman, 14 point type, and contains 13,899 words, as measured by the WordPerfect 9 software.

January 23, 2002 Richard A. Friedman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Brief for the United States were served this day by overnight delivery on appellees' counsel at the following addresses:

William W. Taylor, III, Esq.
Blair G. Brown, Esq.
Amit P. Mehta, Esq.
Zuckerman, Spaeder, Goldstein, Taylor & Kolker, L.L.P
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-778-1800

Michael Goldsmith, Esq.
2697 Cottage Loop
Park City, Utah 84098
435-640-6200

Max D. Wheeler, Esq.
Camille N. Johnson, Esq.
Robert J. Shelby, Esq.
Snow, Christensen & Martineau
10 Exchange Place
P.O. Box 45000
Salt Lake City, Utah 84145
801-521-9000

_____
Richard A. Friedman

January 23, 2002

ADDENDUM A

DISTRICT COURT'S JULY 16, 2001 ORDER AND AUGUST 9, 2001 MEMORANDUM OPINION

ADDENDUM B

DISTRICT COURT'S NOVEMBER 15, 2001 MEMORANDUM OPINION AND ORDER

ADDENDUM C

RELEVANT STATUTES

Travel Act

18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform –

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than five years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Utah Commercial Bribery Statute

Utah Criminal Code 76-6-508. Bribery of or receiving bribe by person in the business of selection, appraisal, or criticism of goods or services.

(1) A person is guilty of a class A misdemeanor when, without the consent of the employer or principal, contrary to the interests of the employer or principal:

(a) he confers, offers, or agrees to confer upon the employee, agent, or fiduciary of an employer or principal any benefit with the purpose of influencing the conduct of the employee, agent, or fiduciary in relating to his employer's or principal's affairs; or

(b) he, as an employee, agent, or fiduciary of an employer or principal, solicits, accepts, or agrees to accept any benefit from another upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs; provided that this section does not apply to inducements made or accepted solely for the purpose of causing a change in employment by an employee, agent, or fiduciary.

(2) A person is guilty of violation of this section if he holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of goods or services and he solicits, accepts, or agrees to accept any benefit to influence his selection, appraisal, or criticism.

Utah Principles of Construction for Criminal Statutes

Utah Criminal Code. 76-1-106. Strict construction rule not applicable.

The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of Section 76-1-104.

Utah Criminal Code. 76-1-104. Purposes and principles of construction.

The provisions of this code shall be construed in accordance with these general purposes.
(1) Forbid and prevent the commission of offenses.
(2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal.
(3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.
(4) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.